SUPREME COURT, U.S.
FILED

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No. 02-OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICHAEL CARTWRIGHT and GARY HOLDER, *et al.*,

Petitioners,

v.

SONNY PERDUE, Governor of the State of Georgia and CATHY COX, Secretary of State of the State of Georgia,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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HAPP

QUESTIONS PRESENTED

1. If a ballot access law for minor party candidates for U.S. House of Representatives is so draconian that it has not been used even once in the 59 years it has existed, is that law unconstitutional?

2. Can a ballot access restriction ever be so severe that it should be classified as an additional state qualification for membership in Congress, rather than just an election procedure?

LIST OF INTERESTED PARTIES

The following is a list of the Petitioners not set forth in the caption: Michael Cartwright; Gary Holder; Jack Cashin; Bob Geller; Dr. Bert Loftman; Guy Hardegree; Jerry Hawkins; Patrick Scheibel; Phillip Bradley; Terrance Swiiney; Tim Forsly; Tracee Avery; and The Libertarian Party of Georgia.

Since the initiation of the action, Mr. Sonny Perdue has succeeded Roy Barnes as Governor of the State of Georgia.

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OPINIONS BELOW

The opinion of the three-judge panel of the Eleventh Circuit Court of Appeals is reported at 304 F.3d 1138, and is set forth in the Appendix ("App.") A.

The opinion of the United States District Court for the Northern District of Georgia is set forth in App. B.

STATEMENT OF JURISDICTION

The October 18th, 2002 order of the Eleventh Circuit denying Petitioners' request for an *en banc* hearing is set forth in the App. C.

The jurisdiction of this court is based upon 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 2, United States Constitution

Fourteenth Amendment, United States Constitution

Official Code of Georgia Annotated ("O.C.G.A.") § 21-2-170(b) (set forth in relevant part in App. D)

42 U.S.C. § 1983

STATEMENT OF THE ISSUES

Whether a ballot access barrier that has prevented third parties from running candidates for U.S. House of Representatives seats for 59 years can withstand constitutional inquiry and attack and whether such barriers are or should be considered to be additional qualifications prohibited by Article I of the United States Constitution.

STATEMENT OF THE CASE

Petitioners challenge the requirements for a minor party or independent candidate for U.S. House of Representatives to gain a place on the general election ballot. Petitioners argue that these laws violate the First Amendment, the Fourteenth Amendment, and Article I of the U.S. Constitution. Georgia's requirements are so severe, no minor party candidate for the U.S. House has qualified for the Georgia ballot in the entire 59-year history of the law.

Petitioners readily acknowledge that thirty-two years ago this Court upheld Georgia's ballot access requirements for all partisan office in *Jenness v. Fortson*, 403 U.S. 431 (1971). Because of the *Jenness* decision, however, the lower courts refused to examine the evidence in this case. Had the lower courts taken even a cursory look at petitioners' evidence, they would probably have declared Georgia's procedures for minor party and independent candidates unconstitutional, as the Second and Eighth Circuits did in similar circumstances.

Georgia's law is only superficially similar to the Georgia law upheld in *Jenness*. Petitions signed by 5% of the number of registered voters of the Congressional district are required for all nominees for U.S. House of Representatives, unless

the candidate is the nominee of a party that polled 20% for president in the entire United States, or 20% for Governor of Georgia, at the last election. This aspect of today's law is identical to the law upheld in *Jenness*.

But changes in Georgia's ballot access law have occurred since *Jenness* was filed in 1970:

1. According to *Jenness v. Fortson*, Georgia petitions at the time did not need to be notarized. At some point since then, Georgia began requiring petitions to be notarized. Georgia notarization law is so strict, if any notary himself or herself circulates a petition, then any petition sheets that were notarized by that notary (even though those petition sheets were circulated by another circulator) are invalid.[1]

2. When *Jenness v. Fortson* was filed, only *one* Georgia county was split into more than one congressional districts. That one county, Fulton County, was cleanly split into two districts. Now, however, Georgia congressional district boundaries split 34 counties. Eight Georgia counties are split into *three* or more congressional districts. Furthermore, these boundaries are extraordinarily convoluted. Petitioners presented affidavit evidence showing the extreme difficulty of collecting valid signatures in districts with irregular boundaries, but the courts below took no notice of this evidence.

1. The notarization requirement is significant. In the 1996 case of *Natural Law Party of Georgia et al. v. Massey*, U.S.D.C., N.D. Ga. (No. 96-9240) (1996), the minor party plaintiffs had submitted more than the number of signatures required for ballot placement of presidential candidates, but those signatures were invalidated by the Defendant Secretary of State's office based on notarization irregularities, as interpreted in *Poppell v. Lanier*, 264 Ga. 473, 448 S.E.2d 194 (1994). The Secretary of State had even held that a petition circulator could not act as a notary for other circulators — a prohibition thought to be unique in the United States.

3. Georgia has long since abandoned 5% petitions for *statewide* offices. In 1979, the petition requirement for minor party and independent *statewide* candidates was lowered to 2.5%. And in 1986, it was lowered again, to 1%. Furthermore, in 1986 the legislature provided that parties that poll 1% of the vote for statewide office, are qualified to nominate candidates for statewide office with no petition required. Under this standard, the Libertarian Party has always polled enough votes to be qualified automatically for the ballot for all statewide offices. However, the 1986 reform did not extend to U.S. House of Representatives elections. Petitioners argued vociferously below that, since Georgia has already acknowledged the Libertarian Party to enjoy a modicum of support, so that the Libertarian Party is automatically ballot-qualified for statewide office, there can be no state interest in requiring the Libertarian Party to submit any petitions for its U.S. House nominees. However, the court below turned a deaf ear to this argument, and appears not to have been aware of the Libertarian Party's ballot-qualified status for statewide office.

The Eleventh Circuit issued its opinion only six days after the hearing, and clearly did not comprehend the Georgia law on this point.

In addition to changes in Georgia law since *Jenness v. Fortson* was filed, new information exists now that was not known in 1970:

1. Only four times in U.S. history has any candidate for the U.S. House of Representatives been able to overcome a ballot access hurdle greater than 10,000 signatures. Today, in the average Georgia district, 14,000 signatures are required.

2. The Georgia 5% petition requirement has never been used by a minor party candidate for U.S. House of Representatives, even though that requirement is now 59 years old. Every other state has had minor party candidates for the U.S. House of Representatives on its ballot during the last few years. Georgia's historical record is shockingly different from the remainder of the United States.

In addition, case law has changed since *Jenness v. Fortson* was issued. This court has repeatedly stressed that "there is no litmus test" to determine if a ballot access law is constitutional or not, and that the court must consider all the evidence presented to it. *Storer v. Brown*, 415 U.S. 724 (1974) at 730 and *Anderson v. Celebrezze*, 460 U.S. 780 (1983) at 789.

Case law has also changed relative to Article I. This Court ruled in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) and in *Cook v. Gralike*, 531 U.S. 510 (2001), that states are powerless to discriminate against a class of candidates for Congress. The lower courts assumed that these decisions have no relevance to ballot access laws. However, they cannot be correct. If they were correct, proponents of congressional term limits would be free to sponsor voter initiatives that would require three-term members of Congress to submit petitions signed by 5% of the registered voters in their districts, in order to gain a place on the ballot, while at the same time providing that other candidates for the same office could attain a spot on the ballot simply by paying a modest filing fee. It is obvious that such a law would be unconstitutional, under *Cook v. Gralike*, *supra*. Petitioners argue that Article I forbids the states from requiring ballot access requirements for any class of candidates that are so draconian they have never been used in their entire lengthy existence. Obviously,

the motivation for such a harsh law is not to administer elections in an orderly manner; the motivation is clearly to discriminate against a class of candidates for Congress.

After the rather summary dismissal of their claims by the three-judge panel of the Eleventh Circuit, Petitioners filed a motion for *en banc* reconsideration that was denied on October 18, 2002. (App. C)

REASONS FOR GRANTING THE PETITION

1. To resolve a conflict between the decision of the Eleventh Circuit in this case, versus decisions of the Eighth and Second Circuits.

The Eleventh Circuit's ruling in this case is in conflict with rulings of the Second and Eighth Circuits that have reached contrary results and its own decision in *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985).

In *Rockefeller v. Powers*, 78 F.3d 44 (2d Cir. 1996) the Second Circuit Court of Appeals affirmed the District Court's[2] striking down a New York ballot access petitioning law requiring 5% petitions to be gathered in *congressional* districts with irregular boundaries. That court also noted that there were other, less restrictive safeguards against ballot crowding that were already in place as to other New York elections. *See Storer v. Brown*, 415 U.S. 724 (1974).

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2. *Rockefeller v. Powers*, 917 F. Supp. 155 (E.D.N.Y. 1996). The District Court's opinion relied upon this court's rulings in *Lubin v. Panish*, 415 U.S. 709, 716 (1974) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Currently Georgia has a 1% petition and a 1% "retention" vote test for *statewide* office that the Libertarian Party has been meeting for 17 years — relaxations from its previously-enforced 5% qualification requirements that came about as a result of the Eleventh Circuit's own decision in *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985). The ruling of the panel below is in conflict with *Bergland*, *id.*

In *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980), the Eighth Circuit struck down a 3.3% petition because in all history, only once had the requirement been used.

Both cases looked at history, as the courts are supposed to do. Neither the District Court nor the Eleventh Circuit did so.

2. To determine whether Article I has any bearing on ballot access laws.

The difference between a "qualification" and a "procedure" lies in an examination of the fundamental question of *what is the motive for the restriction?* If the motivation for the law was to assist in the orderly administration of the election process, it is a procedure.

If, on the other hand, the motivation for the law was to injure a class of candidates relative to another class of candidates, it is a qualification. A trial is in order. The motivations of the Georgia legislature in passing and sustaining the law throughout the last 59 years of never having a single minor party U.S. House of Representatives challenger arise must be established. Clearly not even a full-blown, affidavit-supported Summary Judgment procedure would be an appropriate forum for testing Plaintiffs' Article I claims.

As set forth above, The Ninth and Tenth Circuits have already struck down certain ballot access laws based on the broad principles announced in *U.S. Term Limits v. Thornton*[3], *supra*, and *Cook v. Gralike*, 531 U.S. 510 (2001). *See also Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001), and *Campbell v. Davidson*, 233 F.3d 1229 (10th Cir. 2000), *cert. denied*, 532 U.S. 973 (2001).

The courts below apparently accept Georgia's obvious blind that the offending code section is only "procedural" in nature and does not dictate outcomes when in fact it has dictated outcomes for more than fifty years. The merits, the District Court "found" that "the *explicit intent and effect* of the instant 5 percent nominating petition requirement are not to impose limits on terms of Federal office or otherwise to add qualifications for holding such office" (emphasis added) (App. B, Page 21a). The court drew unwarranted conclusions about the "intent" of the General Assembly of Georgia and ignored the effect of the 5 percent requirement in U.S. House races.

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3. In the majority opinion, the Court stated,

> The text of *Federalist No. 52* belies the dissent's reading. First, Madison emphasized that '[t]he qualifications of the elected . . . [were] more susceptible of uniformity.' His emphasis on uniformity would be quite anomalous if he envisioned that States would create for their representatives a patchwork of qualifications. Second, the idea that Madison was in fact concerned that States would open the doors to national service too widely is entirely inconsistent with Madison's emphasizing that the Constitution kept 'the door . . . open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.'

U.S. Term Limits, *supra*, at 326.

The District Court blithely asserted that O.C.G.A. "Section 21-2-170(b) imposes no substantive qualification on a class of potential candidates for office; rather it merely requires that the potential candidate demonstrate a substantial basis for support for his candidacy; . . ." App. B, Page 21a. This conclusion is demonstrably unsupportable on its face, particularly in view of the fact that major party candidates are not required to show *any* basis of support for their candidacies before being put on ballots — even if they have no opposition in primaries — such a "finding" by the court was based not upon law or fact but upon supposition and/or prejudice.

There have been 308 regularly scheduled U.S. House races in Georgia since 1943 and *not one* has ever been contested by a minor party candidate.

3. To protect the values underlying the U.S. Constitution, as well as the values the United States has committed itself to in International Agreements.

The United States government holds itself out to the world as an example of a government that is based on the consent of the governed. The United States tells the world that U.S. elections are fair and free.

In June 1990 the United States signed the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. That document contains clause 7.5, which says the signatory nations pledge themselves to "respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination". It also contains clause 7.6, which says these nations will "respect the right of

individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law."

In Georgia, ever since the middle of World War II, all U.S. House elections have been conducted under a system in which the Democratic and Republican parties are the only parties that have been able to place candidates on the ballot.

Minor party and independent candidates sometimes are elected to the U.S. House. Petitioners presented uncontroverted evidence that during the 20th Century, at 100 instances, a minor party or independent candidate was elected to the U.S. House at a regularly-scheduled election. This does not include the seven instances at which minor party or independent candidates were elected to the U.S. House in special elections. Nor does it include the 13 instances at which minor party members were elected to the U.S. House, both as the nominees of their own minor party and as the cross-endorsed nomination of a major party.

There were approximately 21,300 regularly-scheduled U.S. House elections during the 20th Century. Thus, in the nation as a whole, approximately one-half of 1% of all U.S. House elections during that century were won by a minor party or independent candidate.

Georgia has held 308 regularly-scheduled U.S. House elections since 1943, when the 5% petition was put in place. If Georgia had had a ballot access law that permitted minor party and independent candidates to appear on the ballot, it is not unreasonable to expect that one or two of the elections

would have been won by a minor party or independent candidate. Consequently, it is reasonable to believe that the Georgia ballot access law has prevented the voters of Georgia from electing candidates who might otherwise have been elected.

Furthermore, this Court ruled in *Williams v. Rhodes*, 393 U.S. 23 (1968)[4], that the Constitution requires that minor party and independent candidates must be given a *reasonable* chance to appear on the ballot, whether neutral observers believe those candidates are capable of winning the election or not. At the risk of giving the lie to American protestations of free and open elections here in the United States, the Courts below have ignored this Court's rulings in *Williams v. Rhodes* as well as the undisputed facts of post-war Georgia history.

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4. During the period 1947-1968, Ohio did not ban all independent candidacies. Ohio only banned independent *presidential* candidacies, and there were independent candidates on the ballot in Ohio 1947-1968 for other offices. One of them, independent Frazier Reams, was elected to Congress twice as an independent during that period.

CONCLUSION

Petitioners have set forth viable claims under Article I of the U.S. Constitution, as well as under the Fourteenth Amendment and are entitled to go forward with Discovery and Trial of all issues relevant to their contentions.

Even in Georgia citizens of the United States are constitutionally protected from having their rights to select their Representatives to Congress cut off by that state's so-far-successful scheme that adds qualifications that are disguised as "mere procedures".

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED SEPTEMBER 5, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10670
D.C. Docket No. 01-01335-CV-JOF-1

MICHAEL CARTWRIGHT, GARY HOLDER, et al.,

Plaintiffs-Appellants,

versus

ROY BARNES,
Governor of the State of Georgia,
CATHY COX,
Secretary of State of the State of Georgia,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(September 5, 2002)

Before HULL, FAY and GIBSON[1], Circuit Judges.

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1. Honorable John R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix A

PER CURIAM:

The Appellants are the Libertarian Party of Georgia, members of the Libertarian Party who want to run for election to the United States House of Representatives in several Georgia districts, and voters from these districts who intend to vote for the Libertarian Party candidates. The Appellants challenge Georgia's requirement in O.C.G.A. § 21-2-170(b) (Supp. 2002) that a candidate from a political body may appear on an election ballot if the candidate obtains signatures in a nominating petition from at least 5% of the registered voters.[2] The main issue in this case is whether this 5% signature requirement creates a new qualification for holding federal office in violation of the Qualifications Clause of the United States Constitution.

After review and oral argument, we agree with the district court that Georgia's 5% signature requirement in § 21-2-170(b) merely regulates the manner of holding elections and does not impose on candidates, or constitute, a qualification for office in violation of the Qualifications Clause. As the district court aptly found, the signature requirement "imposes no substantive qualification on a class of potential candidates for office; rather, it merely requires that the potential candidate demonstrate a substantial basis of support" from the community. We also conclude that this 5% signature requirement does not violate any other constitutional provision.

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2. The Appellants appeal the district court's dismissal of their claim pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for which relief can be granted.

Appendix A

I. DISCUSSION

II. A. Georgia Election Law

Under Georgia law, a political party is any political organization whose candidate received 20% of the vote cast in the state in the immediately preceding Gubernatorial or Presidential election. O.C.G.A. § 21-2-2(25). A candidate may appear on the election ballot if he or she is nominated in a primary conducted by a political party. O.C.G.A. § 21-2-130(1) (Supp. 2002).

However, the name of an independent candidate or a candidate of a political body may appear on the election ballot if he or she submits a nomination petition signed by a specified percentage of voters depending on the type of election being conducted. O.C.G.A. §§ 21-2-170(a) & (b) (Supp. 2002). The Libertarian Party of Georgia concedes that it is classified as a political body for purposes of O.C.G.A. § 21-2-2(23), which means that it is any political organization other than a political party. Where a candidate of a political body is seeking statewide public office, the petition must be signed by a number of voters equal to 1% of the total number of registered voters that were eligible to vote in the last election for such office. O.C.G.A. § 21-2-170(b) (Supp. 2002) & § 21-2-180. Where, as here, the candidate of a political body is seeking federal office (or any non-statewide office), the petition must be signed by a number of voters equal to 5% of the total number of registered voters eligible to vote in the last election for such office. O.C.G.A. § 21-2-170(b) (Supp. 2002). Specifically, § 21-2-170(b) provides that:

> [a] nomination petition of a candidate for any [non-statewide] office shall be signed by a number of voters equal to 5 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected.

O.C.G.A. § 21-2-170(b) (Supp. 2002). It is this 5% requirement that Appellants challenge in this case.

Appellants do not challenge the 1% requirement for statewide elections, which requires them to obtain approximately 39,000 signatures.[3] Instead, Appellants challenge only the 5% requirement for congressional offices, which their complaint alleges requires them to collect approximately 14,846 valid and verifiable signatures of elections in a single Congressional district. Appellants' complaint asserts that no Libertarian Party candidate has ever been able to petition for ballot access in a Congressional race since 1943.[4]

---

3. The 39,000 figure is based upon the total number of registered eligible voters in 1998, which was the year of the "last election for the filling of [statewide] office[s]." O.C.G.A. § 21-2-170 (Supp. 2002).

4. The Appellees dispute and refute this allegation, but in our Rule 12(b)(6) posture, we must assume these allegations to be true.

Appendix A

B. Jenness v. Fortson

In support of their challenges to this requirement, Appellants first acknowledge the decision in *Jenness v. Fortson*, 403 U.S. 431 (1971), where the United States Supreme Court rejected a constitutional challenge to the same Georgia law over thirty years ago. In *Jenness*, the Supreme Court stated that "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest . . . in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Id.* at 442. The Supreme Court compared Georgia's 5% signature requirement with the Ohio election law struck down in *Williams v. Rhodes*, 393 U.S. 23 (1968). The Ohio law barred write-in voting, required nominees to be endorsed by a political party established enough to participate in the state primary, and created a 15% signature requirement that candidates were required to fulfill "unreasonably early." *Jenness*, 403 U.S. at 436-38. In comparison, Georgia's 5% signature requirement, in the context of the "open quality of the Georgia system," was not unconstitutional. *Id.* at 439-40.

After acknowledging *Jenness*, the Appellants argue in this case that Georgia's new notarization requirement and its new congressional districts have changed the Georgia system so much that *Jenness* no longer applies. We disagree. In upholding the validity of the Georgia system over thirty years ago in *Jenness*, the Supreme Court noted that "Georgia impose[d] no suffocating restrictions whatever upon the free

circulation of nominating petitions." *Id.* at 438. The Supreme Court observed that under the Georgia system:

> A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand is a person who was not even registered at the time of a previous election.

Id. at 438-39 (citations omitted). The Supreme Court also noted that "[n]o signature on a nominating petition need be notarized" under the Georgia system. *Id.* at 439.

Under the current Georgia system, it is still true that no signature on a nominating petition need be notarized. The new notarization requirement to which the Appellants referred provides that an individual circulating a petition sheet submit a sworn affidavit before a notary public attesting that, among other things, "each signer manually signed his or her own name with full knowledge of the contents of the nomination petition." O.C.G.A. § 21-2-170(d)(2) (Supp. 2002). The notarization requirement places no restriction upon the ability of a voter to sign a petition.

The Appellants' complaint also alleges that the 5% requirement is no longer acceptable because petitioning experience shows that voters cannot identify correctly their respective congressional districts, especially after reapportionment, thereby requiring petition circulators to acquire surplus signatures. Even accepting Appellants' allegations, we conclude that, like the notarization requirement, reapportionment has not imposed any "suffocating restrictions" upon the free circulation of nominating petitions. Reapportionment arguably may lead to some voter confusion and may place an extra burden on candidates to be sure that they have obtained the requisite 5%. Even so, this does not make the 5% requirement unduly burdensome for independent candidates. In Georgia, as *Jenness* notes, petition circulators have ample time to obtain signatures—about six months. 403 U.S. at 438; O.C.G.A. § 21-2-170(d)(3) (Supp. 2002). Furthermore, no harm results if a voter accidentally signs the wrong petition, as "[a] voter may sign a petition even though he has signed others." *Jenness*, 403 U.S. at 438-39. Also, the boundaries of the districts are known to the petition circulators who readily can ask voters where they reside and thereby ascertain if they reside in the district. In short, Appellants fail to establish that *Jenness* no longer applies.

Appellants also stress that no Libertarian Party candidate has ever been able to satisfy the 5% requirement for ballot access. But *Jenness* directly addressed the 5% figure, stating as follows:

> The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to

> be shown in many States as a condition for ballot position, but this is balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes. Georgia in this case has insulated not a single potential voter from the appeal of new political voices within its borders.

Id. at 442 (citation omitted). In sum, we conclude the following analysis in *Jenness* still equally pertains today, to wit:

> The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization. We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.

Id. at 440-41 (citation omitted).

C. Qualifications and Elections Clauses

We recognize that *Jenness* was premised on the First and Fourteenth Amendments to the Constitution, not the Qualifications Clause, which is the focus of Appellants' challenge. *See id.* at 434. Thus, we now turn our attention to the Supreme Court's decisions involving the Qualifications Clause in *Storer v. Brown*, 415 U.S. 724 (1974) and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

The Qualifications Clause provides that "[n]o Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2. States may not impose additional qualifications for election to the House of Representatives beyond those contained in the Qualifications Clause. *Term Limits*, 514 U.S. at 827.

At the same time, under the Elections Clause, States have the authority to regulate "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. States may enact "numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Term Limits*, 514 U.S. at 834 (citation omitted). The requirement that candidates demonstrate some measure of support before their names appear on the ballot generally is viewed as a legitimate exercise of a state's authority to regulate the manner in which

elections are held. *Storer*, 415 U.S. at 746 n. 16 (1974).[5] The power to create procedural regulations does not, however, "provide States with license to exclude classes of candidates from federal office." *Term Limits*, 514 U.S. at 832-33.

The Supreme Court discussed the Qualifications and Elections Clauses at length in *Term Limits*, where it invalidated Arkansas's term-limits amendment, which barred three-term Representatives from having their names placed on the ballot. In that case, the petitioners cited *Storer* in defining a qualification as a "legal bar" to service. *Term Limits*, 514 U.S. at 828. The petitioners then argued that the Arkansas term limits amendment was not a legal bar

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5. We also reject as frivolous Appellants' claim that Georgia's 5% requirement is similar to the challenged provision in *Cook v. Gralike*, 531 U.S. 510 (2001), which involved a requirement that

> "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed on all primary and general ballots adjacent to the name of a Senator or Representative who fails to take any one of eight legislative acts in support of [a term-limits amendment]. [Another section] provides that the statement "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed on all primary and general election ballots next to the name of every nonincumbent congressional candidate who refuses to take a "Term Limit" pledge that commits the candidate, if elected, to performing the legislative acts [in support of the amendment].

Id. at 514-15.

to service because the amendment only prohibited a three-term incumbent from appearing on the ballot, but did not preclude such an incumbent from running as a write-in candidate, or serving, if elected. *Id.*

In *Term Limits*, the Supreme Court did not fashion a precise definition of qualification in answering the petitioners' argument. The Supreme Court struck down the term-limits amendment using the petitioners' narrow definition of qualification. *See id.* at 829 ("We need not decide whether petitioners' narrow understanding of qualifications is correct because, even if it is, [the term-limits amendment] may not stand."). The Supreme Court reasoned that an indirect denial of constitutional rights was equivalent to a direct denial of those rights. *Id.* at 829. While the term limits amendment was not a legal bar per se, the amendment was an "indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly." *Id.* The Supreme Court held that "an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand." *Id.* at 831.

When the district court dismissed the Appellants' challenge to Georgia's 5% requirement, it applied a two-part test in evaluating whether the 5% requirement violates the Qualifications Clause. The district court first inquired whether the statute creates an absolute bar to candidates who otherwise would qualify for office. After concluding that it did not, the district court then quoted from *Term Limits* and analyzed whether the statute "has the likely effect of

handicapping an otherwise qualified class of candidates and has the sole purpose of creating additional qualifications indirectly." *Term Limits*, 514 U.S. at 835-36; *Schaefer v. Townsend*, 215 F.3d 1031, 1035 (9th Cir. 2000) (applying the same two-part test for evaluating Qualifications Clause challenges), *cert. denied sub nom Jones v. Schaefer*, 532 U.S. 904 (2001). As discussed above, however, the Supreme Court rejected the Arkansas term-limits amendment without "decid[ing] whether petitioners' narrow understanding of qualifications is correct." *Term Limits*, 514 U.S. at 829. Because *Term Limits* leaves open the possibility that the definition of qualification may be broader than presented by the petitioners, it is conceivable that an election provision may not violate the district court's two-part test yet still constitute a qualification prohibited by the Constitution.

We need not decide whether *Term Limits* provides an exhaustive definition of qualification applicable to all Qualifications Clauses challenges. Instead, *Storer* and *Term Limits* identify certain types of ballot access restrictions that are election procedures and not substantive qualifications, and we conclude that Georgia's 5% requirement is likewise an election procedure and not a substantive qualification.

For example, in *Storer*, the Supreme Court rejected a challenge to a California Elections Code requirement that independent candidates not be affiliated with a political party one year prior to the preceding primary. 415 U.S. at 746 n. 16. The nonaffiliation requirement was "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot." *Id.* at 733 ("A candidate

in one party primary may not now run in that of another; if he loses in the primary he may not run as an independent."). The Supreme Court in *Storer* found that the argument that the California Elections Code provision was a qualification was "wholly without merit." *Id.* at 746 n. 16. The Supreme Court went on to say that a nonaffiliation requirement was no more an additional requirement for office than the requirement "that the candidate win the primary to secure a place on the general ballot or otherwise *demonstrate substantial community support.*" *Id.* (emphasis added).

Similarly, in *Term Limits*, the Supreme Court observed that the California Elections Code provision in *Storer* was constitutional because it "regulated election *procedure* [ ] and did not even arguably impose any substantive qualification." 514 U.S. at 835; *see Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 777 (7th Cir. 1997) ("[W]here requirements are procedural in nature and do not add substantive qualifications, they do not violate the Qualifications Clause.") (citing *Term Limits*, 514 U.S. at 835). In *Term Limits*, the Supreme Court also pointed out that other Elections Clause cases recognized that States, under the Elections Clause, are "entitled to adopt generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Id.* at 834 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983)). Georgia's 5% requirement is such a provision, and does not "even arguably impose" any substantive qualification. Instead, it requires that a candidate "demonstrate substantial community support" before obtaining a place on the ballot, an interest that the Supreme Court recognized over

thirty years ago when it upheld Georgia's 5% requirement. *See Jenness*, 403 U.S. at 442 ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot. . . ."); *see Libertarian Party*, 108 F.3d at 777 (upholding a similar Illinois provision that a new political party meet a 5% petitioning requirement to place congressional candidate on general election ballot because the requirement "merely assure[s] that candidates meet a minimum threshold of voter support in order to maintain the integrity and regularity of the electoral process"). Therefore, we conclude that Georgia's 5% requirement is not a "qualification," but a permissible procedural regulation of the manner in which candidates may obtain ballot placement.

For these reasons, we affirm the district court's dismissal of Appellants' complaint.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, DATED AND FILED JANUARY 16, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
NO. 1:01-CV-1335-JOF

MICHAEL CARTWRIGHT, et al.,

Plaintiffs,

vs.

ROY BARNES, Governor of the State of Georgia, et al.,

Defendants.

ORDER

This matter is before the court on Defendants' motion to dismiss [3].

I. Statement of the Case

A. Procedural History

On May 24, 2001, Plaintiffs filed the instant suit against Defendants, Roy Barnes in his capacity as the Governor of the State of Georgia and Cathy Cox in her capacity as the Secretary of State of the State of Georgia, pursuant to 42 U.S.C. § 1983 ("§ 1983"). Plaintiffs consist of

(1) individuals who are members of the Libertarian Party of Georgia and who desire to run for elective office to the United States House of Representatives in three Georgia districts,[1] (2) individuals who are long-time supporters of the Libertarian Party and who intend to vote for the Libertarian Party candidates who run for the United States House of Representatives from these districts,[2] and (3) the Libertarian Party of Georgia. Plaintiffs ask this court permanently to enjoin Defendants from enforcing the provisions of O.C.G.A. § 21-2-170(b) ("§ 21-2-170(b)") as it pertains to the requirement of obtaining ballot petition signatures relative to all United States House of Representatives elections in the State of Georgia. Plaintiffs further ask this court to declare that § 21-2-170(b) is unconstitutional as being in violation of the Qualifications Clause of Article I, Section 2, Clause 2 of the United States Constitution, as well as the Equal Protection, Privileges and Immunities, and Voting Rights provisions of the Constitution of Georgia.

Defendants timely have filed a motion to dismiss in lieu of an answer pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), arguing, among other things, that Georgia's ballot access statute was held to be constitutional by the Supreme Court in *Jenness v. Fortson,* 403 U.S. 431 (1971) and that the 5% petition requirement is a permissible regulation on the manner of holding elections under the Elections Clause of the United States Constitution. Plaintiffs

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1. These Plaintiffs are Michael Cartwright, Gary Holder, Jack Cashin, Bob Geller, Dr. Bert Loftman, and Guy Hardegree.

2. These Plaintiffs are Patrick Scheibel, Terrance Sweeney, Tim Forsly, Jerry Hawkins, Tracee Avery, and Phil Bradley.

object to the motion to dismiss, arguing, among other things, that *Jenness* is distinguishable from the instant case and that no candidate for the United States House of Representatives in Georgia or any other state has managed to comply with a 5% petition requirement since 1966 and no minor party candidate for the United States House of Representatives ever has been able to petition to the election ballot in Georgia since the state enacted its current petition requirements in 1943.[3]

B. Relevant Georgia Election Law

The Libertarian Party of Georgia is a political body under O.C.G.A. § 21-2-2(23), which means that it is any political organization other than a political party. A political party is any political organization whose candidate received 20% of the vote cast in the state in the immediately preceding Gubernatorial or Presidential election. O.C.G.A. § 21-2-2(25). Under Georgia law, a candidate may appear on the election ballot if he or she is nominated in a primary conducted by a political party. O.C.G.A. § 21-2-130(1). However, the name of an independent candidate or a candidate of a political body may appear on the election ballot if he or she submits a nomination petition signed by a

3. The court notes that Plaintiffs have filed a surreply but have not asked leave of this court to do so. The local rules of this court do not contemplate the filing of a surreply. *See generally* LR 7 & 7.1 C, N.D. Ga. (describing pleadings allowed and the form of motions). Therefore, at the very least, Plaintiffs should have sought leave of this court to file this additional pleading. Nevertheless, because Defendants have filed no objection to the surreply and because this court finds it helpful, the court will consider Plaintiffs' surreply.

specified percentage of voters depending on the type of election being conducted. O.C.G.A. § 21-2-170(a & b). Where a candidate is seeking statewide public office, the petition must be signed by a number equal to 1 % of the total number of registered voters that were eligible to vote in the last election for such office. O.C.G.A. §§ 21-2-170(b) & 21-2-180. Where, as here, the candidate is seeking federal office (or any non-statewide office), the petition must be signed by a number of voters equal to 5% of the total number of registered voters eligible to vote in the last election for such office. O.C.G.A. § 21-2-170(b).

II. Discussion[4]

A. Federal Law Claim

The crux of Plaintiffs' federal claim is that the 5% petition requirement for non-statewide elected office

4. In objecting to the instant motion, Plaintiffs have presented affidavits in support of their arguments that their complaint does state a claim for which relief can be granted. With respect to motions to dismiss under Rule 12(b)(6), matters outside of the pleading are not to be considered. Fed. R. Civ. P. 12(b). If on such a motion to dismiss, matters outside the pleading are presented to and not excluded by the court, the motion is to be treated as one for summary judgment. *Id.* Because Plaintiffs have filed and referred to in their response affidavits that were neither attached to nor referred to in their complaint, these affidavits constitute matters outside the pleading that cannot be considered by this court in evaluating the instant motion to dismiss. Furthermore, because Plaintiffs have failed to comply with Local Rule 56.1, N.D. Ga., governing motions for summary judgment, the court will not convert the instant matter into a motion for summary judgment.

unconstitutionally denies them access to the ballot by effectively creating a new qualification for holding federal office in violation of the Qualifications Clause. In contrast, Defendants argue that the 5% nominating petition requirement does not add an additional qualification to run for federal office but instead operates to regulate the "manner" in which the state of Georgia holds its elections pursuant to the Elections Clause.

The Qualifications Clause of the United States Constitution provides: "No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2. Thus, pursuant to the Qualifications Clause, states may not impose additional qualifications for election to the United States House of Representatives nor alter the existing requirements. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 798-827 (1995).

The Elections Clause of the United States Constitution, however, authorizes that the states may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1; *see also Cook v. Gralike,* 531 U.S. 510, 522 (2001). Thus, pursuant to this delegation of power under the Elections Clause, states may regulate incidents of their elections, including balloting. *Gralike,* 531 U.S. at 523. The Supreme Court has held that the term "manner" in the Elections Clause encompasses matters such as "notices, registration, supervision of voting, protection of voters, prevention of

fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Gralike,* 531 U.S. at 523-24 (internal quotations and citations omitted); *see also Term Limits,* 514 U.S. at 833-35.

Indeed, in *Jenness v. Fortson,* 403 U.S. 431(1971),[5] the Court specifically explained that the state of Georgia had "an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot — the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." 403 U.S. at 442. Moreover, numerous subsequent cases have rearmed that requiring a candidate to show a demonstrable basis of support before being afforded ballot position is a permissible regulation by the state on the manner of holding elections. *See, e.g., Munro v. Socialist Workers Party,* 479 U.S. 189, 194 (1986); *Storer v. Brown,* 415 U.S. 724, 746 n.16 (1974); *American Party of Texas v. White,* 415 U.S. 767 (1974). The court thus finds that the 5% nominating petition requirement underlying Plaintiffs' argument is a subject that has been delegated to the states pursuant to the Elections Clause of the United States Constitution and is an issue that has been upheld as constitutional in a variety of contexts at every level of the federal court system.

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5. In *Jenness,* the plaintiffs challenged the 5% nominating petition requirement (which at that time also applied to statewide elections) as violative of their rights to freedom of speech and association under the First and Fourteenth Amendments and their rights to equal protection under the Fourteenth Amendment. *Id.* at 434. The Court held that Georgia's 5% petition requirement was not unconstitutional. *Id.*

Recently, in *Term Limits,* 514 U.S. at 779, the Supreme Court addressed the standard of scrutiny to be applied in cases challenging state election law under the Qualifications Clause where the state urges that the restrictions are constitutional pursuant to the Elections Clause.[6] In addressing the issue, the Court set forth a two-part test for evaluating whether a state's election law violates the Qualifications Clause. The court first must determine whether the statute creates an absolute bar to candidates who otherwise would qualify for office. *Term Limits,* 514 U.S. at 829-31; *Schaefer v. Townsend,* 215 F.3d 1031, 1035 (9th Cir. 2000) (O'Scannlain, J.), *cert. denied sub nom Jones v. Schaefer,* 121 S. Ct. 1225 (2001). If the statute does not, the court then must determine whether the statute has "the likely effect of handicapping an otherwise qualified class of candidates and has the sole purpose of creating additional qualifications indirectly." *Term Limits,* 514 U.S. at 835-36; *Schaefer,* 215 F.3d at 1035.

The explicit intent and effect of the instant 5% nominating petition requirement are not to impose limits on terms of federal office or otherwise to add qualifications for holding such office. Moreover, Section 21-2-170(b) imposes no substantive qualification on a class of potential candidates for office; rather, it merely requires that the potential candidate demonstrate a substantial basis of support for his candidacy; and as explained above, such requirements

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6. In *Tenn Limits,* the Court was presented with a challenge to an amendment to the Arkansas State Constitution that sought to preclude the name of an otherwise eligible candidate from appearing on the ballot if he or she already had served a specified number of terms in federal office. 514 U.S. at 783.

consistently have been upheld as procedural provisions by the Supreme Court. As such, § 21-2-170(b) creates no absolute bar to Plaintiffs' being afforded ballot position and thus withstands scrutiny under the first prong of the *Term Limits* test.

In addition, the nominating petition requirement does not exclude a candidate from the ballot "without reference to the candidates' support in the electoral process." *See Term Limits,* 514 U.S. at 835. Moreover, Defendants admit that obtaining the required percentage of signatures is doable in five weeks if five campaign volunteers work full time in their district, but complain that such a petitioning drive would cost approximately $30,000 to $40,000 per district. This very admission undermines their contention that the 5% requirement has prevented them from gaining ballot access in the preceding years.[7] Accordingly, § 21-2-170(b) withstands scrutiny under the second term of the *Term Limits* test.

This court recognizes and is not unsympathetic to the fact that the Libertarian Party is a legitimate political body and that its statewide candidates repeatedly have received measurable support at the polls. However, the Georgia

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7. In addition, Plaintiffs point out that Georgia now has a notarization requirement which it did not have at the time *Jenness* was decided. The court finds, however, that the notarization requirement in and of itself does not alter the import of *Jenness* because Plaintiffs have not alleged any facts in their complaint that support a claim that the notarization requirement unduly burdens their ballot access. *Cf Cruz v. Melecio,* 204 F.3d 14, 22 (1st Cir. 2000) (appellants' complaint alleged facts to support their claims that the notarization requirement unduly burdened their ballot access).

General Assembly has exercised its discretion under the Elections Clause to define what a "substantial modicum" of support is and how it should be demonstrated. If the requirement repeatedly has been upheld as constitutional in multiple, prior federal cases, then by extension, it cannot be found to be unconstitutional in the instant setting. *See Term Limits,* 514 U.S. 834-35 (reasoning that procedural requirements that do not add substantive qualifications do not violate the Qualifications Clause); *see also Libertarian Party of Ill. Rednour,* 108 F.3d 768, 776 (7th Cir. 1997) (citing *Term Limits*); *Campbell v. Davidson,* 233 F.3d 1229, 1233 (10th Cir. 2000), *cert. denied,* 121 S. Ct. 1605 (2001) ("The evenhanded procedural regulations permissible under the Elections Clause are not at odds with the purposes of the Qualifications Clause."). Therefore, after consideration of all of the cases listed above, which frame the issue in the instant case, this court finds that a nominating petition requirement to this degree of 5% does not constitute an additional qualification for running for office and that Plaintiffs' claim that the 5% petition requirement violates the Qualifications Clause thus lacks merit.

Accordingly, the Defendants' motion to dismiss is GRANTED with respect to Plaintiffs' claim under the Qualifications Clause of Article I, Section 2, Clause 2 of the United States Constitution. The instant claim under said Qualifications Clause hereby is DISMISSED for failure to state a claim for which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

B. State Law Claims

A district court has the discretion to dismiss state law claims when it has dismissed "all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3); *Crosby v. Paulk,* 187 F.3d 1339, 1352 (11th Cir. 1999). If the court exercises this discretion, a plaintiffs state law claims should be dismissed without prejudice so that they later may be brought in state court. *Crosby,* 187 F.3d at 1352. Because this court has found that Plaintiffs' claim under the Qualifications Clause of the United States Constitution, the only claim over which this court has original jurisdiction, fails to state a claim for which relief can be granted, the only claims remaining in this suit are state law claims under the Constitution of the State of Georgia. Accordingly, Defendants' motion to dismiss the state law claims is DENIED. Instead, this court exercises its discretion and DISMISSES WITHOUT PREJUDICE these state law claims.

III. Conclusion

Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART. Plaintiffs' federal claim that O.C.G.A. § 21-2-170(b) is unconstitutional as a violation of the Qualifications Clause of the United States Constitution is DISMISSED pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for which relief can be granted. Plaintiffs' claims pled under the Constitution of Georgia are DISMISSED WITHOUT PREJUDICE pursuant to 28 U.S.C. § 1367(c)(3).

Appendix B

SO ORDERED this 16th day of January 2002.

s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 18, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-10670-CC

MICHAEL CARTWRIGHT
GARY HOLDER, et al.,

Plaintiff-Appellants,

versus

ROY BARNES,
Governor of the State of Georgia,
CATHY COX,
Secretary of State of the State of Georgia,

Defendant-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Appendix C

Before: HULL, FAY and GIBSON*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

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* Honorable John R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX D — RELEVANT STATUTE

O.C.G.A. § 21-2-170(b)

(b) A nomination petition of a candidate seeking an office which is voted upon state wide shall be signed by a number of voters equal to 1 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected. A nomination petition of a candidate for any other office shall be signed by a number of voters equal to 5 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected. However, in the case of a candidate seeking an office for which there has never been an election or seeking an office in a newly constituted constituency, the percentage figure shall be computed on the total number of registered voters in the constituency who would have been qualified to vote for such office had the election been held at the last general election and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected.